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No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

vs.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION, AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Indian tribal government which provides a broad range of governmental services may tax a transaction between two non-Indians who benefit from police protection and other governmental services provided by the Indian tribal government on fee land within the reservation?

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I. STATEMENT OF THE CASE

Petitioner, Atkinson Trading, is a New Mexico corporation operating several businesses on its property, located within the exterior boundaries of the Navajo Indian Reservation in Arizona. The property includes a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. Petitioner challenges the authority of respondents, the Navajo Nation, to impose the Hotel Occupancy Tax on Petitioner's overnight guests. The courts below upheld validity of the tax.

This holding is consistent with this Court's recognition of an Indian nation's inherent taxing authority as an exception to the general rule illustrated in *Montana v. United States*, 450 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Tenth Circuit's ruling accurately comprehended this inherent taxing authority in upholding the validity of the Hotel Occupancy Tax. *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000).

II. STATEMENT OF FACTS

Petitioner, Atkinson Trading Company ("Atkinson Trading"), is a New Mexico Corporation. Pet'r App. 95a.[1] Atkinson Trading holds certain real property which is located in Cameron, Arizona in fee simple. Pet'r App. 96a. Atkinson Trading operates several businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post. Pet'r

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[1] Petitioner's Appendix shall be referenced as Pet'r App..

App. 96a. Atkinson Trading has also engaged in sales to members of the Navajo Nation and purchased arts and crafts from them. Pet'r App. 96a. Atkinson Trading has approximately 120 employees, 75-80 per cent of whom are Navajo tribal members. Pet'r App. 96a. The Navajo Nation is an Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah. Pet'r App. 96a. By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, the exterior boundaries of the Navajo Nation were confirmed and Petitioner's property is completely surrounded by Navajo Nation reservation trust lands. Pet'r App. 96a.

Atkinson Trading's businesses on the property are focused on the tourist market and deal primarily with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon. Pet'r App. 96a. Atkinson Trading's guests travel across the Navajo Nation on federal highway 89 and state highway 64 to reach Atkinson Trading's property. Pet'r App. 96a. These highways pass over rights-of-way granted by the Navajo Nation. The highways are jointly patrolled by the Arizona state and Navajo tribal police but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. Pet'r App. 57a. A substation of the Navajo Nation police department is located in Cameron. Pet'r App. 57a. When the emergency number 911 is dialed from Atkinson Trading, the call is forwarded to the Navajo Nation Police Department. Pet'r App. 97a. The Navajo police enforce a non-loitering policy at the Trading Post. The Navajo police provide assistance to motorists on the highways leading to the Trading Post,

including giving directions and changing flat tires. Pet'r App. 57a.

The Navajo fire department and the Bureau of Indian Affairs fire departments, both located in Tuba City 25 miles away, provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post to which the Navajo fire department responded. Pet'r App. 57a.

Emergency medical services in the Cameron area are provided by a Navajo Nation entity called the Emergency Medical Service Department. This entity responds to all calls within the Navajo Nation including numerous calls from the Cameron area. Pet'r App. 58a. The tribal police and fire departments have also responded to many calls concerning auto accidents in the Cameron area involving both Navajo and non-Navajos. Pet'r App. 58a.

The Navajo Nation provides a variety of health services to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the territorial jurisdiction of the Navajo Nation. Pet'r App. 97a. The Navajo Nation Tourism Department has used tribal funds to provide facilities at several tourist areas on the Navajo Nation for the health and safety of tourists traveling across the Navajo Nation. Pet'r App. 97a. The Navajo Nation Government funds various government activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions. Pet'r App. 98a.

On July 30, 1992, the Navajo Hotel Occupancy Tax was signed into law by the President of the Navajo Nation. The Hotel Occupancy Tax purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation. Pet'r App. 98a. The Hotel Occupancy Tax requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so. Pet'r App. 98a. The Hotel Occupancy Tax is imposed on guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land. Pet'r App. 98a. The rate of the tax is 8% of the price of the room. 24 N.N.C. § 103.

III. SUMMARY OF ARGUMENT

Petitioner, Atkinson Trading, alleges the Tenth Circuit panel's decision conflicts with two decisions of the U.S. Supreme Court. Pet. at 10. *Montana v. United States* concerned the ability of the Crow Tribe to regulate hunting and fishing by non-members on lands owned in fee simple by non-members, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). The United States Supreme Court's acknowledgment of an Indian nation's inherent taxing authority is clearly depicted in the cases that form the basis of the exception to the *Montana* rule cited by this Court in its decision. The inherent authority exception interpretation of *Buster v.*

Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), in *Montana* has been consistently recognized by the U.S. Supreme Court in other cases. In *Merrion*, the Court reiterated that the Jicarilla's power to tax was not simply based on the tribe's right to exclude but was an inherent power of the Jicarilla Tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-144 (1982). The relevant question is twofold: 1) whether Atkinson Trading avails itself of the "substantial privilege of carrying on business on the reservation" or 2) whether Atkinson Trading's guests "benefit from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38, *quoting Mobil Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940), and *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (*quoting Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)).

This Court characterized its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). It is abundantly clear that the trilogy of decisions in *Montana, Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have cited to *Buster* as being an exception to *Montana* rule. *Montana* and *Strate* do not limit a tribe's taxing

authority over noncitizens within fee land. In fact, they both recognize the tribal taxing authority as an inherent authority exception to the general rule in *Montana*.

The *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). Actually, the *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn*, at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax on activities of taxpayers.

This case is simply not worthy of certiorari. The law in this area is very clear and has been since the *Buster* decision.

IV. ARGUMENT

NEITHER *MONTANA* NOR *STRATE* LIMIT THE NAVAJO NATION'S TAXING AUTHORITY IN THIS CASE.

A. *Montana v. U.S.* recognizes the inherent taxing jurisdiction of an Indian nation over Indian Traders and their economic activities as a consensual exception.

Montana v. United States concerned the ability of the Crow Tribe to regulate hunting and fishing by non-members on lands owned in fee simple by non-members, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). This Court's recognition of an Indian nation's inherent taxing authority is best illustrated by reviewing the cases that form the foundation of the

exception to the *Montana* rule cited by the Court in its decision. The Court in *Montana* acknowledged the inherent taxing authority of Indian nations by declaring:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-566.

The *Montana* Court's decision explicitly held that a tribe may regulate, through taxation. *Id.* at 565. One of the cases cited by this Court for the *Montana* inherent power exception was *Buster v. Wright*. *Id.* at 565. In *Buster*, C.W. Buster, a non-Indian, owned and operated a grocery store located on fee land which was surrounded by reservation trust land. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). The Eighth Circuit held that C.W. Buster, the trader was subject to a tribal tax imposed by the Creek Nation and that the tribe could employ the Secretary of the Interior to enforce it. 135 F. at 954.

The authority of the tribe to tax the non-Indian trader, C.W. Buster, was not based on the tribe's ability to

exclude Mr. Buster from the exterior boundaries of the Creek Indian Reservation. Instead the authority was found to be inherent, and the fee status of the land was simply not relevant to the question of tribal power to tax. The *Buster* court stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

135 F. 950. The *Buster* Court recognized that a tribal government has the power to tax the economic activity of those who choose to engage in economic activity within the exterior boundaries of an Indian reservation. Such economic activities are subject to the tribe's taxing authority just like every other economic entity. There is no express Congressional act that specifically exempts Indian traders from their responsibility to collect or pay Indian taxes. Like the Indian Trader in *Buster,* Atkinson is subject to conditions which the Navajo Nation may choose to put upon its privilege of doing business within the reservation. Like the Creek Nation in *Buster,* the Nation possesses the lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders. *Buster,* at 949. The authority of the Navajo Nation to prescribe the terms upon which noncitizens may transact business within its

borders did not have its origin in an act of Congress, treaty, or agreement of the United States. Instead, it is one of the inherent and essential attributes of its original sovereignty. *Merrion,* 455 U.S. at 141. It is an inherent right of the Navajo Nation, indispensable tc its autonomy as a distinct tribe or nation, and it remains an attribute of its government. *Buster,* at 950.

It is quite notable that Atkinson Trading has been determined to be an Indian Trader under 25 U.S.C. §§ 261 *et seq.* and 25 C.F.R. § 141. *Ashcroft v. United States Dept. of Interior,* 679 F.2d 196, 199 (9th Cir. 1982). As an Indian Trader, Atkinson's circumstance is virtually identical to that of C.W. Buster. In addition to its trading activities, Atkinson Trading operates several other businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post. Pet'r App. 96a. The activities carried on by Atkinson Trading are very similar to the activities carried on by C.W. Buster and there is no legitimate way to distinguish this case from *Buster.*

1. *Merrion v. Jicarilla Apache Tribe*

The inherent authority interpretation of the *Buster* decision has been consistently acknowledged by this Court in other cases. Previously, the Court recognized that the Jicarilla Apache Tribe's power to tax was not simply based on the tribe's right to exclude but was an inherent power of the Tribe. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 143-144 (1982). This Court in *Merrion* explained:

> Finally, the decision in *Buster v. Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster v. Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[neither] the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." 135 F., at 952. This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Id. at 143-144.

The power of taxation rests on a tribe's territorial jurisdiction, not on the power to exclude nonmembers from the reservation. *Buster*, 135 F. 947, at 950, *Merrion*, 455 U.S. 130, at 142. This Court in *Merrion* explained:

> . . . there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Merrion, 455 U.S. at 142. Under this analysis, the fact that Atkinson Trading is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the Navajo Nation's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe. A "Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government." *Merrion*, 455 U.S. at 144.

The analysis in *Merrion*, and its discussion of past cases upholding the tribal power of taxation over non-Indians, indicates that the relevant question is not land status, but is, rather twofold: 1) whether Atkinson Trading avails itself of the "substantial privilege of carrying on business on the reservation" or 2) whether Atkinson Trading's guests "benefit from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38, *quoting Mobil Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940), and *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228

(1980) (*quoting Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). In sustaining tribal taxes over non-Indians in *Merrion*, the Supreme Court stated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Merrion, 455 U.S. 130, at 137. In Atkinson Trading's case, although located on fee land, its business is clearly on the reservation, within the Navajo Nation's territorial jurisdiction. *Ashcroft*, 679 F.2d 196, at 199. The Navajo Nation funds a wide variety of governmental expenditures. Pet'r App. 96-97a. Many of these governmental services have been found to benefit either Atkinson Trading or its guests in addition to other residents of the Navajo Nation. Pet'r App. 96-97a. It is obvious that Atkinson Trading "benefit[s] from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38.

This reasoning was followed in later tribal tax cases where the Ninth Circuit stated "The relevant question is

not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). Atkinson engages in business activity, and Atkinson's guests also travel across the Navajo Nation to Atkinson's business location, all within the territory of the Navajo Nation. Pet'r App. 96a. Thus, the Navajo Nation may tax, because Atkinson Trading's guests have consented to the jurisdiction of the Navajo Nation by entering the Navajo Nation territory where the Navajo government provides the "intangible benefits of a civilized society, . . . and the tangible benefits of police and fire protection." *Burlington Northern R.R.*, 924 F.2d 899, at 904. This territory-based analysis respecting the tribal power to tax is consistent with the treatment of the state power to tax. Indeed, the Supreme Court in *Merrion* did measure tribal taxing power by standards regularly applied to states. So long as the tax is fairly apportioned, and is levied upon those whose activity presents a nexus with the taxing entity, there is nothing exceptional in requiring Atkinson and its guests to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. 130, at 138, 156; *citing to, Commonwealth Edison v. Montana*, 453 U.S. 609 (1981), and *quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Simply put, so long as the non-Indian is within the governmental territory of the tribe, and the non-Indian enjoys the benefits of a civilized society, the tribe is rightly empowered to tax to pay for the cost of providing governmental services. The Navajo Nation does indeed

provide police, fire, and other essential governmental services to the residents of and visitors to the Navajo Nation. Pet'r App. 97a; Pet'r App. 66-67a; *Atkinson v. Gorman*, No. 97-1261 (D.N.M. filed Aug. 21, 1998).

2. *Strate v. A-1 Contractors*

More recently, this Court reiterated the inherent authority of Indian nations to impose their taxes on nonmembers on fee lands. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* concerned the adjudicatory authority of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation over a personal injury action with nonmember defendants. The accident that generated the personal injury actions occurred on a highway maintained by the State running through the Fort Berthold Indian Reservation. Neither of the parties to the auto accident were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. This Court held that the specific right-of-way grant in *Strate* was equivalent to non-Indian land for nonmember governance purposes. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). This Court then determined that the highway accident did not meet either of the two retained inherent sovereignty exceptions identified in *Montana*. *Strate*, at 457-459.

This Court held that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation did not possess adjudicatory authority over the personal injury claim where both of the automobile accident participants were not members of the Tribe. In making its determination, the Court reinforced the validity of the

inherent tribal taxing authority over nonmember economic activity on fee lands within the exterior boundaries of an Indian reservation. *Strate*, at 457.

This Court in *Strate* recognized that the inherent civil authority of Indian tribes and their courts extended to nonmembers who enter relationships with the tribe or its members, citing *Montana*, 450 U.S. at 565, 566; to non-Indians entering the reservation to engage in economic activity citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). *Strate*, at 457. This Court clearly explained the type of cases that fit within the first *Montana* inherent authority exception as follows:

> Montana's list of cases fitting within the first exception, see 450 U. S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U. S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U. S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U. S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law [*35] or necessary implication of their dependent status").

Strate, at 457. It is abundantly clear that the trilogy of decisions in the cases, *Montana*, *Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases recognize the factual situation in *Buster* as being an exception to the *Montana* rule. The factual situation in this case calls for the identical result.

B. THE NAVAJO HOTEL OCCUPANCY TAX WOULD BE ALLOWED UNDER *BIG HORN*.

The Ninth Circuit decision has held that the tribal power to tax does not authorize tribal taxation of property used for utility purposes pursuant to a right of way granted through a reservation. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). In so doing, the panel overruled *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), which upheld tribal government taxation of utility property located within reservation rights of way. The panel based its ruling and its overruling of *Burlington Northern*, on the intervening Supreme Court decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Id.* at 950.

The Ninth Circuit erred in invalidating the tribal tax at issue in *Big Horn* and in finding that the decision in *Burlington Northern* had been undermined by *Strate*. *Big Horn* at 953. *Strate* deals with torts, not taxes, and with adjudication, not taxation. A tribe's power to tax is broader than its civil adjudicatory jurisdiction over nonmembers. *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 2000). It simply is not applicable to this case nor to *Big Horn*. *Strate* involved a tort action

over which tribal adjudicatory authority was disputed. It concerned an accident between non-Indians on a state owned public highway, a situation the Supreme Court characterized as "distinctly non-tribal in nature." 520 U.S. at 457. As Justice Souter stated for a unanimous Supreme Court in *El Paso Natural Gas Corp. v. Neztsosie*. 526 U.S. 473, 482 n.4 (1999), "*Strate* dealt [only] with claims against non-members arising on state highways."

In contrast, this case involves a dispute over tribal legislative authority to tax activities within non-Indian-owned fee lands located within the exterior boundaries of the Navajo Nation. This distinction is entirely compatible with the cases dealing with tribal government taxation on fee lands. For example in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), specifically cited with approval by the Supreme Court in *Strate*, 520 U.S. at 457, the court upheld a tribal permit tax upon non-members for the privilege of conducting business on fee lands within the tribe's borders. 135 F. at 952-54. And most recently, in a post-*Strate* decision, the Ninth Circuit in *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), on remand from the Supreme Court for further consideration in light of *Strate*, expressly distinguished this taxing power from the question of civil adjudicatory authority over non-members that *Strate* presented. *Id.* at 1063 (citing *Merrion*, 455 U.S. at 141-42). In *Red Wolf*, the court concluded that the tribal taxing power over rights-of-way previously upheld by this Court in *Burlington Northern*, is "broader than its civil adjudicatory jurisdiction over non-members." *Id.* at 1064. These principles have equal application to this case and *Big Horn*.

Therefore, the panel erred in ruling that *Strate* undermined tribal taxing power. *Big Horn,* at 953. There is nothing in *Strate* that professes to modify, much less overrule, the principles of *Merrion*. In fact, *Strate* does not address any question concerning tribal legislative power but simply holds that tribal adjudicatory authority over non-members *does not exceed* tribal legislative jurisdiction, 520 U.S. at 453. *Red Wolf* correctly concludes that the tribal tax power is broader than tribal civil adjudicatory jurisdiction over non-members. 196 F. 3d at 1063. Contrary to the *Big Horn* decision, neither *Strate* nor *Red Wolf* undermines the existence of tribal government taxing power over the fee lands involved here.

Finally, the *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. The *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn,* at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax. An ad valorem tax is a tax on the value of property. BLACK'S LAW DICTIONARY 51 (6th ed. 1990). An excise tax is a tax imposed upon performance of an act, the engaging in an occupation, or the enjoyment of a privilege. BLACK'S LAW DICTIONARY 563 (6th ed. 1990). The *Big Horn* court recognized this distinction when it stated "An ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, . . . " *Big Horn,* at 951. The *Big Horn* Court also acknowledged that the Crow Tribe could impose an excise tax when it stated " . . . the Tribe is free to adopt a different tax scheme that complies with *Montana*." *Big Horn* at 951. The Navajo Hotel Occupancy

Tax is the type of excise tax that the *Big Horn* Court had in mind. The ad valorem tax at issue in *Big Horn* is not the same type of tax at issue in this case.

V. CONCLUSION

Under the existing law of this Court, the Navajo Nation clearly possesses taxing jurisdiction in this case. Atkinson and its guests benefit from police protection and other governmental services provided by the Navajo Nation. Because these non-Indians benefit from the advantages of a civilized society, there is nothing exceptional in requiring them to contribute to the cost of government through taxes. Therefore, the Navajo Nation may properly apply and enforce the Hotel Occupancy Tax. The *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. The *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn*, at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax.

Wherefore, Respondents respectfully request that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted this 23rd day of October, 2000.

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